REMARKS ON THE LAW

OF

LITERARY PROPERTY

IN DIFFERENT COUNTRIES,

AND THE

PRINCIPLES ON WHICH IT IS FOUNDED.

BY

GEO. CARSLAKE THOMPSON, LL.B.,

Of Christ's College, Cambridge, and of the Inner Temple, Barrister-at-Law.

"Proputty, proputty, proputty—that's what I 'ears 'em saäy—"
TENNYSON.—*Northern Farmer, New Style.*

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A NEGLECTED ASPECT OF THE LAND QUESTION.

"Stare super antiquas vias."

"Jog on, jog on, the foot-path way."
—*Winter's Tale. Act IV., Scene 2.*

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THE LAW OF LITERARY PROPERTY

IN DIFFERENT COUNTRIES,

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I.

The question what are the principles which ought to regulate the law of property in literary compositions may be approached from one of two standpoints, and accordingly as one or the other of these is adopted, so will the method appropriate to it be applied to the solution of the problem.

If literary property constitutes a class by itself, the settlement of the vexed questions which hang round the subject of copyright must be attempted by confining the attention to the persons immediately affected, any analogies afforded by property in other things being rejected as misleading, or at best inapplicable to the endeavour fairly to adjust the competing claims of authors and book buyers. If on the other hand literary property is a species of the genus "Property," then copyright is simply a particular case of ownership in general, and we must endeavour to apply considerations of the same sort to authors which apply to owners of other property; and if the principles which ought to regulate the law of property in general are known, the law which ought to regulate copyright may be deduced from them.

The first question which arises, therefore, is whether the

term " literary property " is correct ;—in other words, does the word " property " in that phrase really stand for property, or is it only used by way of a remote and fanciful analogy ?

To answer this we must go a step further, and ask what is the differentia of property in general, and does literary property possess it.

According to one view, and that, no doubt, the popular one, " property" is some *thing* which the owner has a right to use ; a notion which finds its expression in the question-begging interrogatory, " May I not do what I like with my own ? "

Strictly speaking, however, " property" is the right which the owner enjoys, and the thing owned is the subject matter of property. Jurisprudential analysis makes it clear that there are no such things as rights, save as the result of duties, and in this view property consists of the sum of the remedies which the law (if we are talking of legal property) gives the owner to restrain other people from any violation of their duties with respect to the thing owned.

But is a man's mere right to use something, in other words, the mere duty laid on the rest of the world to abstain from molesting him when he is using it, enough to warrant us in saying that he has a right of property in that thing ?

There are some things which every one has the right to use. Such are the sea or a navigable tidal river for fishing, a highway, or an expired patent. Such things, though often spoken of as " common property," are not strictly the subject matter of rights of property, or, as we say in common parlance, though it is an ellipsis which sometimes leads to confusion, they are not property at all.

Something then besides the right to use, is required to

constitute ownership. If the first notion generally excited by the word "property" is expressed in the phrase, "May I not do what I like with my own?" not far behind it lies the notion, "No one shall touch my property without my leave," and this last notion an owner will often push to an unwarrantable length, becoming the victim of an insidious fallacy which runs as follows:—

(1.) Because the law prevents other people dealing with subject matter X in modes A.B.C. I call X mine.

(2.) Because X is mine I am entitled to prevent other people dealing with it in modes E.F.G., &c., to the end of the alphabet.

But apart from this exaggeration, this popular notion goes to the root of the matter. It is not the owner's right but the owner's *exclusive* right to use the subject matter which constitutes his property in it, and the owner's exclusive right is only another expression for the compulsion laid on every one else to abstain from using it, it may be by positive law, or the fear of punishment at the hands of the State if a legal duty is violated, or it may be by the moral compulsion exercised by the prevailing sentiment of the community, or it may be by the dictates of his own conscience, or by fear of the consequences of sin.

It is not difficult to see how the popular notion which identifies ownership with the right of using the thing has sprung up. In the cases where it is physically possible for a number of people to be using the subject concurrently, the duty of each to abstain from interfering with his neighbour's enjoyment will suffice to ensure to each the actual opportunity; but it is otherwise in the large and striking class of cases where the subject matter is monopolised or consumed by use. In such cases evidently

the man who has the exclusive right of using will be the only man who can rely upon having the physical opportunity of doing so. My power of eating my cake to-morrow will depend on the duty of other people to abstain from eating it to-day. Assuming a tract of land answering to the popular but incorrect notion of an English common, my mere right is enough to ensure me the actual enjoyment of walking there whenever I feel inclined, but with respect to any wild fruits that may grow there my mere right to gather them is not enough to ensure me the actual enjoyment of them if I do not happen to be the first comer. No doubt the earliest subjects of property were things which were consumed or necessarily monopolised in the act of using, such as the hunter's weapons or the spoils of the chase. It was observed as a matter of fact that with respect to such things the owner only had the physical opportunity of using them; this practical result overshadowed and usurped the name of its juridical cause, the right of the owner to compel others to abstain; and then it seems to have been assumed that the physical opportunity of using must always be co-extensive with the right, and so the two notions got confused together.

With the economic progress of society the number of things which are common property (so-called) continually decreases. Exclusive rights acquire a money value, and it becomes worth while to enforce prohibitions which in an earlier stage of society it was not worth while to enforce. Interests arise which clamour loudly for legal recognition, or claim legal protection as their due. The tendency is strong to grant what seems to be a boon to definitely ascertainable people, while the *locus standi* of the public to object is hardly admitted.* When the waste land

* A good example is afforded by the demand for indefeasibility of title to words, &c., registered as trade-marks, that is to say to prevent manufacturers at

surrounding the old Teutonic village was allotted in severalty it became the property of the cultivator, and others lost their liberty of having recourse to it. In the three mile belt of sea surrounding the English coast, from which foreign fishermen are excluded, we see to-day the intermediate stage in which a thing is the subject matter of property as between State and State, but common to all the subjects of the owning State.

The supposed antithesis between liberty and *order* has been a fertile theme, but our analysis suggests the existence of an antithesis between liberty and *property*. Property consists in restrictions laid upon the natural liberty of all the world, except the owner, of dealing with the thing owned. In this restriction of liberty we find the essential characteristic of property of which we were in search. Literary property, then,which consists in restrictions on the liberty of every one except the owner to multiply copies of his book is rightly so-called, and not merely by way of a fanciful analogy, and the rights of authors ought to be regulated by the same principles as the rights of other owners.

This is just the principle invoked by those who put the claims of authors highest, and they appear to found on it a claim to perpetual and universal copyright, but does this result necessarily follow ?

It is difficult to see any argument for perpetual restriction on the right of multiplying copies of an author's book, on the ground of the abstract rights of authors to literary property, which would not be equally good as an

large describing their goods by registered words even though they may turn out to be descriptive words in common use heretofore.

It is not questioned that such words might get upon the register in spite of the scrutiny of the registrars and the watchfulness of interested traders;—but it is strangely contended that it is as absurd to deny indefeasibility on this ground as it would be to impose a protective duty for the sake of two or three producers.—(MR. ARTHUR ARNOLD'S letter in the *Times* of March 17, 1883.)

argument for perpetual restriction on the right of the purchaser of a copy from the author to lend it or read it aloud. Such a form of copyright as this last is quite conceivable, and indeed, something very analogous exists in the shape of musical and dramatic copyright. But who would say that the restriction which exists on the liberty of performing a musical composition at a place of dramatic entertainment, implies a restriction on any one's liberty to sing the song in a drawing-room, or in the open air? But law recognises the claims of composers to the advantage the one restriction gives them, the other would be felt to be intolerable; and yet on what ground of principle, if we start with a notion of a right of property for all purposes in musical compositions, can these two be distinguished? It will not do to say money is involved in one case, and not in the other; the composer might and would require people to take out licences to sing his songs anywhere, if the law gave him a remedy against those who did not.

The grounds (ethical and economical) of that interference with the natural liberty of the world at large which constitutes "property" are either :—

(1) That the person in whose favour such restrictions are made has a moral right (shall we say would otherwise be disappointed of a reasonable expectation according to which he has governed himself?) to the advantages they give him.

or (2) That a much *better* use of the subject matter can be made by one person than if all the world were free to use it.

Looked at in this way, it by no means follows because certain rights of property in a given subject matter are just or expedient, that all other rights are just or expedient too. The right of a man and his successors in title to

prevent through all time, other people so much as laying a finger on a watch which he has made, is one thing. The right of a man who has the exclusive right of cultivating a field to prevent other people walking in it, is another thing. The right of a man who has made a machine to prevent other people making other machines like it, is yet another thing Each separate interference with the general liberty to deal with the subject must be considered on its own merits, and every disability must make out a case for itself.

It has already been observed that a man who claims to prevent people using something which is his, in a way which the law does not forbid, on the ground that it is legally his own, commits a logical error. It is, of course, otherwise if he means that the thing is morally his own for all purposes, and that it ought to be legally so too. He is on firm ground if he can shew that justice or general expediency require that the law should be altered to give effect to the moral claim he sets up. But do we not often see claims set up on the bare ground of ownership which are hardly less preposterous than those of Spain and Portugal in the old days to divide the navigation of the ocean between them?

In the upshot then, so far from concluding that authors ought to have secured to them by law more extensive powers of restricting the multiplication of copies of their books than they already possess, from the mere circumstance that literary property—where it exists by the law of the country—is (to use a favourite comparison) as truly property as a man's right to his watch, we invert the common argument, and instead of deducing a perpetual copyright from the fact that a real right of property does exist, we call upon authors, along with owners of other property, to shew cause, founded on the convenience of mankind, or upon some claims to our abstention which the

conscience of mankind recognises as valid, *why* the law should impose restrictions upon us in their favour.

II.

Looked at in this light the question, what principles have in fact been acted on in different countries, with reference to the claims of authors to prevent the multiplication of copies of their works by unauthorised persons, becomes one of more than merely antiquarian interest. We do not, to be sure, go the length of saying whatever is, is right. On the one hand the law may lag behind the exigencies of developing industries, or changing social conditions, in giving a legal sanction to claims which all who are not warped by immediate self-interest in the matter recognise as reasonable. On the other hand, it has sometimes happened that an observed fact has given rise to a legal theory in pursuance of which an owner has been set up, and has had far more extensive rights of ownership ascribed to him, than the fact, if rightly apprehended, would warrant. (We may perhaps instance the rights to the soil of the waste which English law ascribes to a lord of the manor, and Lord Cornwallis's settlement of Lower Bengal.)

Still, if it has been the custom to refrain from making a certain use of anything out of respect for what is regarded as the moral claim of some person to have that particular exclusive use of it, and when in process of time the custom begins to be broken in upon by persons who are not amenable to the restraining force of mere opinion, if then positive law steps in and supplies a legal sanction, all this affords strong *prima facie* evidence that the exclusive right is in accordance with the requirements of the convenience of mankind or of natural justice, as recognised by the general conscience, and furthermore, that these requirements are

adequately met by restrictions to the extent which those who framed the positive law have imposed.

Now this is exactly what has happened in the case of copyright.

Shortly told, the history of copyright is this.

Although it is true that among the Romans copies of literary works were produced for sale by the labour of slaves, and it even appears probable that the copyists paid for the author's original manuscript, yet the question hardly became a practical one till after the invention of the printing press.

For a time, actuated by a sense of fairness, printers refrained from reproducing books which had already been brought out by another, and it was thus possible for authors to obtain payment for their manuscripts.

But as time went on, as the number of presses multiplied, and competition became keener, printers arose who were not bound by this tacit understanding. Then authors began to look to the Sovereigns for protection, and in many cases succeeded in obtaining grants of exclusive rights. Each such grant was a matter of special favour, and was made on terms considered appropriate to the particular case.

But the power of granting monopolies by royal prerogative was one which was extremely likely to be abused. It was often exercised for the purpose of raising revenue, or for enriching a favourite, to the great detriment of the public, whose liberty was recklessly curtailed in every direction. It was, in short, a prolific source of jobbery. Literary monopolies by royal favour were swept away with the rest. However, the claims of authors were recognised, and to give effect to them, general laws were enacted providing conditions on which any author might obtain certain well defined exclusive rights with respect to

his work, and the period during which he might enjoy them.

Thus in the history of copyright generally, we distinguish three well marked periods :—

The Age of Courtesy.

The Age of Privileges.

The Age of general Statutes.

III.

But though these broad outlines are universal, the development of copyright in each country presents features peculiar to itself.*

France, perhaps, affords the simplest case, and it is in France that respect for literary property appears to have been carried to the highest point.

The printing of another's book was, it seems, regarded as being as bad, if not worse than the theft of a chattel. No carefulness, it was said, could guard against it. It was stealing a thing confided to the public honour. By an ordinance of 1613, penalties were imposed on the unauthorised printing of *privileged* books. Here we have an intermediate stage; the *title* to the right is conferred by a special privilege, but the *sanction* is imposed by a general law.

An edict of Louis XIV. (February 27th, 1682,) prohibited booksellers and printers from printing any books the sole privilege of printing which had been granted to another, under pain of corporal punishment. However, by another edict four years later, the corporal punisment was reserved for a second offence, but the party twice offending was for ever disabled from exercising his trade of bookseller or printer.

*See Lowndes on Copyright. Copinger on Copyright. Klostermann, Das geistige Eigenthum.

The Council, under Louis XVI. in 1777, decreed that a privilege granted to an author should be enjoyed by him and by his representatives after his death for ever, unless it should be assigned, in which case it should cease at the death of the author. By an edict of the next year a penalty of 6,000 livres was imposed on printers printing, or booksellers having copies of pirated editions, and on a second offence, in addition to the fine, the offender was rendered incapable of exercising his trade. Moreover, the offender was liable to a suit for damages by the owner of the copyright.

All privileges, of whatever kind, were abolished at the Revolution (edict of the National Assembly, August 4th 1789), but a general law was enacted by the Convention (July 19th, 1793), which gave authors for their lives, and their representatives or assigns for a further period of ten years, the exclusive right to reproduce their works, on pain of a fine equivalent in value to 3,000 copies of the original edition for infringement.

By the Code Pénal of March, 1810, literary piracy was made a *délit*, punishable by a fine of 100 to 2,000 francs, besides the action for damages, and the forfeiture of the pirated copies, for the benefit of the aggrieved author.

By a decree of February of the same year, the term of exclusive enjoyment after the author's death, was extended to the whole life of his widow, and in the case of his *children*, to twenty years after the death of their father, or his widow; and by a law of July 14th, 1866, the term was extended in favour of all the representatives of an author for fifty years after his death.

The prohibition which the French law thus lays upon unauthorised reproduction of books comprehends not merely the books of native authors, but extends to those published in foreign countries, and this even in the

absence of a convention on the subject between France and the foreign country in question.

In Germany, privileges were granted both by the Emperor, and by the rulers of the various territories. Penalties for the contravention of the exclusive rights accorded were imposed in some instances by the particular privileges themselves, but in addition to this there were many general laws, (analogous to the French ordinance of 1613 spoken of above) which recognised the fact that privileges existed, and imposed general penalties for their infringement.

The German privileges commence with the sixteenth century. The first recorded occurs in the year 1501, and was granted by the Imperial City of Nuremberg, and remarkably enough, it was accorded not to an author, in respect of a new work, but to a publisher, in respect of the republication of an old one. This circumstance appears to indicate that the first recognition of copyright by the State, so far as Germany is concerned, so far as it was not a mere fiscal expedient, was due to a desire to promote a commercial speculation which was useful to the public, by securing to its originators the opportunity of obtaining adequate returns, rather than by any notion of the abstract justice of giving an author property in his writings Various other Imperial privileges occur in the early part of the sixteenth century, and in 1534 Luther's translation of the Bible was published at Wittenberg under the protection of a privilege granted by the Elector of Saxony.

But the territorial sub-divisions of Germany were a great source of vexation. As the power of the Emperor declined, the Imperial privileges became of less and less importance. In contrast to the French law alluded to above, the general laws enacted by particular towns, duchies, or electorates, as a rule only recognised the privileges granted

by their own little State, and expressly exempted from penalty the reproduction of foreign books. In three exceptional instances to be sure (Nuremberg, 1623; Frankfort, 1660; Saxony, 1686), the multiplication of even *unprivileged* books to the damage of native publishers who had honestly obtained them, was prohibited, and these cases are remarkable as being probably the earliest instances in Germany of the third and final stage in the development of copyright; copyright by virtue of a general law, irrespective of special privilege. But we notice here again that it is the commercial enterprise of the *publisher* which seems to be the primary object of solicitude, though incidentally, no doubt, some advantage may have been afforded to the author. On the other hand, at a much later period (1806), by which time the views prevailing as to literary property appear to have undergone some modification, Baden allowed foreign *authors* to obtain protection for their works published in Baden, while foreign *publishers* were protected only so far as reciprocity extended.

But the territorial sub-divisions were not the only cause which hindered the development of a general copyright in Germany. In marked contrast to France, there was in Germany a strong assertion of the liberty of printing and publishing, and this was not given up without a struggle. Indeed it seems that the rise of the notion of a general exclusive right of authors may have been the effect rather than the cause of the partial privileges which had been granted. Albrecht Kichhoff, in his history of the German book trade, remarks that complaints of piracy were less numerous in the seventeenth than in the eighteenth century, and he accounts for this by observing that in the first place people had not yet risen to the conception on the subject now obtaining; and secondly that the chief

object of the Imperial privileges was to bring fees to the Imperial coffers; republication was regarded as regular and proper, and the protection the privileges afforded as an exception from it. He goes on to speak of a controversy which ensued as to the rightfulness or the contrary of republication, and of a long struggle for the universal recognition of literary property, only decided in quite recent times.*

An indication of the growing tendency to regard the claim to literary property with respect, is to be found in the apologetic tone of the Hanoverian enactment of 1778, with respect to the express recognition of the lawfulness of republishing foreign books. "To be sure we by no means approve of unauthorised multiplication (Nachdruck), in the abstract. However, as long as the practice is not generally prohibited, and while foreigners continually derive profit from it, we do not think we can prescribe narrower bounds to our own subjects." Again in 1790 and 1792, the Emperors Leopold II. and Francis II. by the compacts which they entered into on their election, promised the suppression of unauthorised book multiplication, but nothing effectual was done, and after the dissolution of the Empire in 1806, authors or publishers who desired protection throughout Germany, were forced to apply for "privileges" to thirty or forty different territorial rulers.

Prussia was the foremost in urging the adoption of a general law of copyright for the German Confederation. She herself passed from the age of privileges into that of general law in 1794, when copyright received a general statutory recognition, and the duration was fixed at the life of the author, and a further period of thirty years from his death. With respect to the German Confederation at large

* Beitrage zur Geschichte des Deutschen Buchhandels, Chap. V., p. 117. Leipzig, 1851.

the subject was touched on at the Congress of Vienna, but it made very slow progress in the Diet. Meanwhile, Prussia was active in negotiating treaties of reciprocity with other German States. At length, in 1837, the Confederation was brought to agree to a general law, but this result was only achieved by the advocates of copyright at the price of their consent to a limitation of the duration of copyright to a term of ten years from publication. A curious survival or prolongation of the age of privilege occurred in special grants of longer periods in particular cases, as for instance, in favour of the works of Goethe and of Schiller. In 1845 the period of protection for the German Confederation at large was extended to that which had been adopted by the Prussian law of 1794 ; viz., the term of the author's life, and thirty years after his death, and this is the term which is still assigned for the duration of copyright by the law now in force in the German Empire.* By that law, infringement of copyright appears to be regarded as partaking of the nature of a criminal offence. An infringer is liable to an action for damages, and unless he has acted in good faith, also to a fine not exceeding 3,000 marks, or in default to six months' imprisonment, but the injured person has the option of demanding the payment of a large fine to himself, in lieu of damages, and criminal proceedings against an infringer are not commenced at the instance of the State, but on the initiative of the aggrieved person.

Turning now to England, there are many indications that as soon as the diffusion of printing made the question a practical one, there arose an instinctive impression that a new book was the "property" of the author in the sense that its reproduction by any person not authorised by him was an unfair and improper interference with his rights. How far exactly this forbearance should go, whether it

* Regulated by the three Statutes of June 11, 1870, January 9, and January 10, 1876.

should extend for all time, or only for a limited period, was probably not thought out, but there are numerous references to the property of authors in their books, as something which actually existed, although the legal remedies may have been inadequate to its vindication.

Thus, in the earliest bye-laws of the Stationers' Company, fines were imposed on anyone printing a book *belonging* to another, and various ordinances of the Long Parliament prohibit the printing of books without the *owner's* leave, on pain of forfeiture of the pirated copies to him, and of further penalties.

It is remarkable that the renewal of the Licensing Act, which recognised entry on the register of the Stationers' Company as the test of ownership, and protected the registered owner, was opposed by a number of booksellers in 1692, on the ground, among others, that it *destroyed the property* of authors in their copies. This at first sight seems incomprehensible; but it seems that the register had become an engine of extortion and of fraud. Large sums were exacted as the condition for the making of the entries without which an author could obtain no redress, and not only so, but persons entitled to appear upon the register as owners, were sometimes barred by surreptitious entries, or fradulent tampering with the books.

It is perhaps worth noticing in this connection that the majority of the judges in answer to questions propounded by the House of Lords,* expressed the opinion that the author's exclusive right existed at Common Law—apparently through all time—but that the author's Common Law right had been cut down to the statutory limits imposed by the Act of the eighth year of Anne, chap. 19.

But whatever may have been the historical opinion of the judges in the time of George III. as to what the legal

* Donaldson v. Becket. 4 Burrows, 2408.

rights of authors would have been if the statute of Anne had not been passed, it is clear that the first interference of the sovereign power to give the sanction of positive law to the supposed right of property, was by way of privileges in the forms of patents to printers, confined as usual, to a limited term.

The English privileges begin with Henry VIII. The first was in 1518. Seven years appears to have been a not unusual term. They appear to have been expressed to be founded on equitable considerations, rather than on the King's generosity, as was the case in grants of other monopolies.

In England the passing of copyright from the age of privileges to the age of general laws is most curiously implicated with the censorship of the Press.

It was avowedly in order to check the publication of "many false fond books and ballads, rhymes and other lewd treatises in the English tongue, both heretical and seditious," that the printers were incorporated by Mary (1556) under the name of the Stationers' Company. Non-members were prohibited from printing. By their charter the Company were empowered to make bye-laws. By their bye-laws they provided that all books printed should be entered on the register of the Company, and that any member printing a registered book of another should be fined.

Thus a general legal sanction for literary property was introduced, though only at second hand, or by "unwritten law," using the phrase in Austin's "juridical sense."

But the point to notice is how merely *incidental* this seems to have been to the designs of bringing the productions of the printing press under a rigid scrutiny and control. It is not till the final lapse of the Licensing Acts in 1694, that these two matters get disentangled.

The incorporation of the Stationers' Company marks the commencement of a new era, but the two ages overlap. The granting of privileges went on, and under Elizabeth it was greatly abused. Monopolies were granted for the printing of whole classes of books to individuals who farmed out these rights for exorbitant sums.

The Act of James I. (1623) abolishing the power of the Crown to grant monopolies corresponds in England to the edict of the National Assembly (August 4, 1789) in France. It contained no saving clause in favour of the authors of new books, as it did in favour of the true and first inventors of new manufactures. Traces of privileges perhaps still linger in the case of the printing of so-called "prerogative copies" ("It is said that Her Majesty and her successors have the right of granting by patent from time to time to their printers an exclusive right to print the text of the Authorised Version of the Bible, of the Book of Common Prayer, and possibly the texts of Acts of Parliament"*), and also in the perpetual copyright enjoyed by the Universities, but broadly speaking with the Act of James the age of privileges comes to an end.

As we have seen the first general law was a mere bye-law; and there were members who set their Company at defiance. The Privy Council was petitioned, and the bye-laws were re-inforced by laws promulgated directly by the sovereign authority. From soon after the incorporation of the Stationers' Company till the meeting of the Long Parliament, we have a series of decrees of the Star Chamber, and of royal proclamations, and from the time of the Long Parliament to the time of William and Mary we have a series of statutes, and these general laws dealt with

* Art. 10 of Sir James Stephen's Digest of the Law of Copyright, appended to the report of the Copyright Commissioners, 1878 (Parliamentary papers C. 2036), and see Arts. 11 and 12.

two matters which were really quite distinct and separate. In the first place they imposed penalties for printing books which had not been approved and licensed by authority, and in the second place they imposed penalties for printing books which were the property of another according to the bye-laws of the Stationers' Company.

Milton distinguishes between these two objects of the ordinance of the Long Parliament "To regulate printing,' very clearly. "For that part which preserves justly every man's copy to himself, or provides for the poor, I touch not, only wish they be not made pretences to abuse and persecute honest and painful men who offend not in either of these particulars," but he attacks "That other clause of licensing books, which we thought had died with his brother quadragesimal and matrimonial when the prelates expired."*

But others went further, and advocated the sweeping away of *all* restrictions on the liberty of any one to print what books he chose. This provoked a strong remonstrance from a number of divines who upheld the expediency of a law of copyright. It is very noteworthy that they did so, not only on the familiar ground that stationers pay authors for their works, and therefore it is just they should have a property in them, otherwise scholars would get no recompense, but also, distinctly recognising the question as one to be approached from the standpoint of general utility, they contended that this particular restriction would be more for the interests of literature than unqualified freedom of multiplying copies of books ;—a freedom under which,they urged, authors and buyers would be abused by vicious impressions to the great discouragement of learned men.

We have seen that one of the grounds on which the

* Areopagitica, sec. 5.

Licensing Acts finally lapsed was the unsatisfactory nature of the machinery provided by the Stationers' Company, and its liability to be actually turned against those whose claims to protection it purported to recognise, and it is therefore only to be expected that when the Licensing Acts were gone,and the bye-laws of the Company afforded the only legal sanction, there would be a demand for such legislation as should be adequate to secure to authors and publishers the exclusive rights which they were claiming. Accordingly we find that numerous petitions were presented, praying that security might be given to the proprietors for quiet enjoyment of their property in their copies. The Stationer's Company, to be sure, about this time * passed bye-laws which recited the facts that some of the members of the Company had great part of their estate in copies; that copies were constantly bargained and sold, devised to children for legacies, and to widows for maintenance; that by ancient usage of the Company when any book was duly entered to any member on their register, he had always been reputed and taken to be the proprietor of such book, and ought to have the sole printing of it, and that this privilege and interest had of late been often violated and abused, and for remedy provided that any one printing or selling without the consent of the member by whom the entry was made should for each copy forfeit twelve pence. But neither the forfeit of twelve pence, nor the ancient and reasonable usage,the appeal to which seems to take us back to the age of courtesy sufficed. "The liberty now set on foot of breaking through this ancient and reasonable usage is no way to be effectually restrained but by an Act of Parliament," urged petitioners for an Act in 1709. The

* Bye-laws of 1681, made during temporary lapse of the Licensing Act, and Bye-laws of 1694 made on its final lapse.

same year the law (8 Annæ c. 19) was passed which marks the advent of the third period of copyright with its characteristics fully developed.

The exclusive rights of multiplying books for the periods prescribed by that statute were now sanctioned by penalties or forfeitures directly imposed by a general law, but characteristically enough, the form of entry on the register book of the Stationers' Company was retained, and made a condition without which the protection of the general law could not be invoked. The duration of the protection granted was meagre: twenty-one years from the 10th of April, 1710, in the case of existing books, and in the case of books to be published in future, fourteen years, with a further term of fourteen years if the author should then be living. In 1842 the term was extended to the life of the author, and seven years after his death, or forty two years from publication, whichever period should be the longer.

A word should perhaps be said about the claim to the exclusive right of performing a drama, or a piece of music which has been sanctioned by the positive law of many States.

The circumstance which made this question of "performing right" a practical one, and which therefore bears to it the same relation as the invention of the printing press bears to copyright proper, is that change in the conditions of public amusements which may perhaps be indicated by contrasting the circumstances of the production of a Greek tragedy with the circumstances of the production of a modern play like "Our Boys."

In the one case, it was a question of a fitting ritual for a solemn festival. A chorus was granted to the author whose work was selected as most fitting for the occasion. In the other case it is a question whether this manager or

that shall receive the playgoer's money for providing him with an evening's entertainment.

The fact of value becoming attached to the performing right indicates an approximation of the function of the performers to that of mere machines, and that what audiences will pay to see or to hear is the getting through with the entertainment rather than the personal rendering of it by the artists engaged.

It seems that the constitution of property in the performance of dramatic or musical composition in general comes much later than the constitution of copyright proper, and as a rule not till after the age of privileges has passed. The terms of exclusive performing right first enacted are generally shorter than those of exclusive copyright, but before long the two become equalised by further legislation.

In England the first statutory protection of dramatic performing right was accorded in 1833, and of musical performing right in 1842. The Prussian law of 1837 protecting both species of performing right, was adopted by the German Confederation in 1841. However, both in England and in Germany there had been instances of earlier interferences by the courts with the liberty of performing the dramatic works of an author without his leave.

In France the statutory recognition of dramatic performing rights preceded that of copyright by two years. A decree of 1791 protects the performing rights of authors of dramas for their lives and five years. A declaration of the right of any citizen to open a theatre and represent the works of any author who had been dead for five years, notwithstanding all ancient privileges, suggests that in France dramatic performing rights had known the age of privilege.

IV.

As between States, it is not an obligation recognised by international law that each one should, by its municipal law prohibit its own subjects from reproducing the works of foreign authors, although France, as we have seen, regards it as incumbent upon her to do so. Internationally, we see copyright in process of a development very similar to that which we have traced in the case of municipal copyright, only the process is as yet incomplete. Eventually the "courtesy of the trade," which often for a time affords an international copyright sanctioned by usage and opinion, breaks down. It is to be noticed, however, that the courtesy of the trade did not in its inception extend to *authors* in foreign countries (or even across the Irish Channel), whose works appear to have been regarded as fair game. The ability of such an author to publish exclusively through the publisher of his choice was the *result* of the courtesy of the trade, as between the publishers themselves. Richardson, whose "Sir Charles Grandison" was brought out in Dublin almost at the same time with the London edition, observes that the Irish booksellers scrambled for the first printing of a new English book, and happy was he whose agent first sent him a copy. This kind of property was never contested with them by authors in England, and was agreed among themselves to be a sufficient title, he goes on to say, though now and then there was a shark who preyed upon his kind. Up to recently it appears to have been the custom that an American publishing firm which secured priority for the reproduction of an English book was not interfered with by other American firms. By virtue of this usage popular English authors have been paid large sums for "advance sheets" by American publishers, and something like a rule to do so was springing

up. But the "enterprise" of some publishers in Chicago and New York has put an end to this state of things, and "the publishing trade is in a state of anarchy."*

Conventions, founded on reciprocity, and giving subjects of the contracting States the benefit of the municipal law have been concluded in many instances between different countries. In one aspect these seem to represent for States the age of privileges, in another to be merely contracts to extend a mutual courtesy.

The United States is a conspicuous example of a country which has hitherto refused to enter into conventions of this kind.

Meanwhile, authors of various nationalities are associating themselves together to promote the international recognition and protection of exclusive rights of multiplication.†

The principal object of the State in setting up copyright by positive law has been, no doubt, to secure to authors a pecuniary recompense. This the State is concerned to do upon two grounds: both to stimulate useful production and to satisfy the sense of a just claim. In setting up laws which answer, but do not go beyond these two ends, the State is acting upon the principles which ought to govern it in reference to property of all kinds, and the general practice of modern States points to the conclusion that some such term as forty years of restriction on the general liberty will be adequate to these purposes.

But besides the pecuniary interests of authors it is also a matter of concern to the public, no less than to authors themselves, that literary fame should be rightly apportioned,

* W. Ray's article on "International Copyright," *Nineteenth Century* Magazine, November, 1881.

† See Proceedings of Fourth Congress of the International Literary Association at Vienna, October, 1881, alluded to in above-mentioned article.

and that literary work should be preserved from emendation or corruptions, which the author would not approve, and which, as far as they go, destroy the characteristic features he has impressed upon it. We have seen how in the seventeenth century the exclusive control of authors over the reproduction of their works was advocated as tending to preserve the purity of the text. But it may be remarked that copyrights are generally assigned by authors, and again that in the case of important works there is abundance of literary anxiety, and the resources of scholarship are freely expended to ascertain what the author really did say.

Plagiarism is often regarded as a violation of literary property, but it differs from unauthorised multiplication in this, the latter is the production of an article for sale, which is indistinguishable to all intents and purposes from that from which it is copied. Plagiarism is the production of something which derives all its value from an old article, but which professes to be a *new* article.

Unauthorised multiplication (it is a pity we have not a short technical word like "Nachdruck,"—"piracy" seems a little too wide) touches only the *pocket* of the author; it is a compliment to him rather than otherwise; but plagiarism may touch him in two places—his pocket and his fame.

So far as his fame is concerned, his remedy is by appeal to the judgment of the literary world, and not to the positive law. For simple plagiarism in general there is no legal remedy, and it is difficult to see how one could be afforded without risk of interfering unduly with the liberty of authors to avail themselves of the results which others have arrived at.

In America the view has been advanced by the economist Carey, that all literary work is founded on what

has been done by others, and that authors cannot properly be said to *create;* and this appears to be used as an argument for the non-recognition of any literary property at all.

The argument has great force so far as it relates to any attempt to create a legal property in *ideas*, or to render amenable to positive law those guilty of that improper or unacknowledged use of them which is called plagiarism. But it does not seem to touch the question of mechanical multiplication of copies, so long as the protection is strictly confined to this, and does not extend to cases where the words are altered, although the ideas may remain the same.*

If the work complained of, though professing to be something new, is in reality nothing but the old work marred and disguised, it may be, but with its *identity* not destroyed, then it is a case of unauthorised multiplication. Whether the identity is preserved or not is in each case a question of fact. People are by no means agreed as to what uses of published material are fair and to what extent the original authors ought to be entitled to prevent others building on the foundation they have laid unless permission so to do has been purchased from them. There are two opposing contentions on this head, which may be stated as follows:—On the one hand, it is said that when an author has once published his book, he has made his contribution to the world's stock of ideas, from which all are free to draw, and that no use of them can be improper

* There is a curious contrast in English law in this respect between copyright and patents. If an article is patented, subsequent independent invention does not authorise its manufacture. The law of copyright is more liberal. If a subject is only capable of correct treatment in one way, as, for example, a table of logarithms, or taking Poe's account of its genesis, such a poem as "The Raven," then if a second author goes through the same process, and arrives at the same result, Poe's copyright does not prevent the publication of the second poem.

so long as credit for originality, where originality does not exist, is not assumed. On the other hand, it is said that an author is justly entitled to participate in every advantage that can be derived from his ideas, and to enable him to do so he should be empowered to prevent their adoption in any shape or form except upon his own terms. Sir James Stephen, in the note appended to his signature of the report of the Copyright Commission (1878), combats the view that authors "ought to be considered to have a right to every advantage which can possibly be derived from their works of art, even indirectly and by the exercise of independent ability."

He is talking of paintings and sculpture as well as of literature, but the same principles apply:—

"It is admitted that in many instances these acts" (dramatising a novel, copying a picture, and so on) "inflict no money loss on the author of the work of art, but it is said that they may hurt his reputation, and it is assumed that he is entitled to appropriate to himself evey indirect advantage which may be obtained from his work. I think artistic reputation is too delicate a matter to be made the subject of legal protection. The law of copyright ought, in my opinion, to protect money interests only, and I think that the only money interests which it should protect are those which it creates; that is to say, the money interest of the author of a work of literature or art capable of being reproduced by mechanical means in such a manner that every copy is as valuable as the original."

Dryden, it is true, did not presume to turn the "Paradise Lost" into "The State of Innocence" until Milton had said, "he would give him leave to tag his verses," and but the other day* a modern dramatic author repudiated with

* See correspondence as to "The Squire" and "Far From the Madding Crowd," published in the *Daily News* of January 2, 1882.

vehemence the suggestion that his play was founded on a popular novel.

The exclusive right of representing the incidents of a successful novel in dramatic form upon the stage might be a valuable pecuniary property, but it is not one which the English law has recognised,* and it is by no means clear that such dramatisation without the first author's leave is in all cases improper.

Translations are another instance where it may be questioned whether a new work is produced or an old one in an altered form. In France, to publish a translation appears to be an infringement of copyright.

"Attendu que la traduction d'un livre français en langue étrangère reproduit nécessairement l'ouvrage original."†

In Germany, section 6 of the law of January 11th, 1870, provides that translations in various specified cases are equivalent to unauthorised multiplications.

In England the law is different: every translation is regarded as a new and substantive work, and to publish a translation of a book is no infringement of the author's copyright. But this is subject to the qualification that on the basis of reciprocity, protection for a period not exceeding five years may be given to foreign authors who have authorised the publication of *one* translation in England against the publication of a *second* translation.

By French and German law, as by our own, it appears that the writer, and not the receiver, of a private letter, has the right of publishing it himself, and of preventing others from doing so, on the ground, it appears, so far as German law is concerned, that the unauthorised publisher is

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* Reade v. Conquest, 9, Common Bench, New Series, 755.

† Paris Police Regluations of March 23, 1847.

estopped by his own act from setting up that the writing he had chosen to publish is not the subject matter of literary copyright.

By our own law the right of authors, who have not chosen to multiply their manuscripts or to publish them for sale, to prevent the unauthorised publication of them by other people rests on quite different grounds. It is much more extensive than the statutory "copyright" of which publication and registration at the Stationers' Hall are conditions precedent. According to the view of the law of England, although a man cannot publish his work for limited purposes, but must be content if he gives the world his ideas to see the world make what use of them the law allows, it is otherwise if he does not publish it at all. He may *lend* his unpublished MS. for any limited purposes he chooses, and the law will restrain the borrower from making any other use of it. He may part with the property in the paper, but the persons to whose hands it comes will not be allowed on that account to publish the writing without authorisation. In other words, the English law protects the *privacy* of documents which the author has chosen to treat as private. What is to be said as to the restriction on the liberty of other people from making them public, if they chance to get hold of them? Why surely this; that it is a restriction akin to those legal restrictions which really secure to a man his social freedom rather than to those restrictions which constitute his property in any chattel.